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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. ———

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these cases.[1]

OPINIONS BELOW

The *en banc* opinion of the court of appeals (*Florida Power* Pet. App. A, pp. 3–75) [2] is not yet officially

[1] The petition covers two cases which were consolidated for purposes of argument and decision in the court of appeals—*International Brotherhood of Electrical Workers, AFL–CIO, et al.* v. *National Labor Relations Board*, No. 71–1559 (hereafter *Illinois Bell*), and *International Brotherhood of Electrical Workers, Locals 641, et al.* v. *National Labor Relations Board, et al.*, No. 71–1712 (hereafter *Florida Power*). The charging parties in both cases have filed petitions for certiorari, Nos. 73–549 and 73–556, respectively.

[2] "Pet. App." refers to the appendices to the petitions in *Florida Power*, No. 73–556, or *Illinois Bell*, No. 73–549, as indicated.

reported. The decisions and orders of the National Labor Relations Board (*Florida Power* Pet. App. B, pp. 77–102 and *Illinois Bell* Pet. App. 26a–41a) are reported at 193 NLRB 30, and 192 NLRB 85, respectively.

JURISDICTION

The judgment of the court of appeals (*Florida Power* Pet. App. A, pp. 1–2) was entered on June 29, 1973. On September 19, 1973, the Chief Justice extended the Board's time for filing a petition for a writ of certiorari to and including November 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining members who are supervisors for crossing a picket line and performing rank-and-file work during an economic strike against the employer.

STATUTES INVOLVED

The relevant provisions of the National Labor Relation Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Section 2. When used in this Act—
>
> * * * * *
>
> (3) The term "employee" shall include any employee, * * * but shall not include * * * any individual employed as a supervisor * * *.
>
> * * * * *
>
> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, re-

call, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

Section 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

STATEMENT

A. THE BOARD'S DECISIONS

1. ILLINOIS BELL

For many years, Local 134, IBEW, has been recognized by Illinois Bell Telephone Company as the bargaining representative, not only for rank-and-file em-

ployees, but also for certain supervisors working at its Chicago, Illinois "Plant Department." Under the terms of the union security clause of the collective bargaining agreement, all members of this bargaining unit—including "P.B.X. Installation Foremen," "Building Cable Foremen" and "General Foremen"—must become and remain members of Local 134 (*Illinois Bell* Pet. App. 28a–29a). It is undisputed that these foremen are supervisors within the meaning of Section 2(11) of the Act, and that they adjust employee grievances on behalf of Illinois Bell (*id.* at 30a).

Between May 8 and September 20, 1968, Local 134 engaged in an economic strike against Illinois Bell (*id.* at 29a). The Company informed the foremen that it would like them to work, but that the decision whether to do so would be left to each foreman—those who refrained from working would not be penalized (*ibid.*). Local 134, however, warned the foremen that they would be subject to discipline if they performed rank-and-file work during the strike (*ibid.*).

During the strike, some foremen crossed the union's picket line and performed rank-and-file work, while others stayed away from the plant (*id.* at 30a). After the strike, Local 134 imposed fines of $500 upon each foreman who had performed rank-and-file work during the strike (*ibid.*).[3] Most of the fined foremen ap-

[3] Local 134 also imposed fines of $1,000 upon each of the five foremen who had formed an association (Bell Supervisors Protective Association) to obtain counsel for and otherwise protect those foremen who chose to work during the strike (*Illinois Bell* Pet. App. 29a–30a).

pealed to the International Union, which, except where there was procedural irregularity, sustained the fines (*ibid.*).

Upon charges filed by the Bell Supervisors Protective Association (see p. 4, *supra*, n. 3), the Board (Member Fanning dissenting) held that Local 134 and the International Union, in so disciplining supervisor-members, violated Section 8(b)(1)(B) of the Act. The Board followed its decision in *Local 2150, IBEW* (*Wisconsin Electric Power Co.*), 192 NLRB 77, issued the same day, wherein the Board had stated (*id.* at 78):

> During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives. * * * The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This

> cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. * * *

The Board ordered the unions, *inter alia,* to rescind the fines levied against the supervisors, to expunge all records of the fines, and to reimburse the supervisors for any portions of the fines paid (*Illinois Bell* Pet. App. 33a–34a; see *id.* at 23a–25a).

2. FLORIDA POWER

Since 1953 System Council U–4 has represented eleven local unions of the IBEW in collective bargaining with Florida Power & Light Company (*Florida Power* Pet. App. A, p. 5). The collective bargaining agreement does not require employees in the bargaining union to become members of the union; accordingly, union membership is voluntary (*ibid.*). The bargaining unit consists not only of rank-and-file employees, but also of supervisors who are union members (*id.* at 6). Other higher ranking supervisors have also retained membership in the union, although the union does not represent them in collective bargaining (*id.* at 6–7). Both unit and non-unit supervisors are supervisors within the meaning of Section 2(11) of the Act, and they possess and exercise authority to adjust employee grievances on behalf of Florida Power, and to act as its representative in matters involving collective bargaining (*Florida Power* Pet. App. B, p. 81).[4]

[4] However, three of the supervisors supervised and adjusted the grievances of only employees outside the bargaining unit (*Florida Power* Pet. App. B, p. 81).

Between October 22 and December 28, 1969, the local unions engaged in an economic strike against Florida Power (*Florida Power* Pet. App. A, p. 9). Both unit and non-unit supervisors crossed the picket lines and performed work, including some work normally performed by rank-and-file unit employees (*ibid.*). After the strike, five of the local unions fined, in amounts up to $6,000, and/or expelled from membership in the union and the System Council U–4 Death Benefit Fund, those supervisors who had worked during the strike (*id.* at 9–10).

Upon charges filed by Florida Power, the Board (Member Fanning dissenting), relying upon its two prior decisions in *Illinois Bell* and *Wisconsin Electric, supra,* held that the five locals violated Section 8(b)(1)(B) of the Act by disciplining supervisors "for performing struck work" (*Florida Power* Pet. App. B, pp. 82–83). The Board ordered the locals, *inter alia,* to rescind and refund all fines, to expunge all records of the disciplinary proceedings involving the fined supervisors, and to restore those persons to full membership in the union and the Death Benefit Fund (*id.* at 85–88).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals, in a 5-to-4 *en banc* decision,[5] concluded that "Section 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-

[5] The *en banc* decision replaced an earlier panel decision in *Illinois Bell,* 81 LRRM 2257 (*Forida Power* Pet. App. F, pp. 123–179).

and-file struck work" (*Florida Power* Pet. App. A, p. 52). The majority was of the view that Section 8(b)(1)(B) went no further than to proscribe union attempts to discipline supervisors for the manner in which they performed their management functions, and that there was little likelihood that discipline of supervisors for performing rank-and-file struck work would significantly affect the performance of those functions. The majority reasoned that, "when a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees, he is no longer acting as a management representative * * *. [T]he supervisors will not be serving two masters at the same time. They will be serving them at different times" (*Florida Power* Pet. App. A, pp. 24–25; internal quotation marks omitted).

The dissenters stated, *inter alia,* that the majority (1) was "unrealistic" in asserting that the supervisors' performance of rank-and-file work during a strike was "totally unrelated" to the collective bargaining process and their responsibilities in it, and (2) was unwarranted in reversing the Board's determination that the unions' imposition of sanctions on the supervisors would adversely affect their loyalty to their employers regardless of the type of work they performed during a strike (*Florida Power* Pet. App. A, pp. 60–63).

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals, that Section 8(b)(1)(B) of the Act does not protect supervisor-members of a union from union discipline for crossing a picket line and performing rank-and-file work during an economic strike, conflicts with the decisions

of two other courts of appeals.[6] In *National Labor Relations Board* v. *Local 2150, International Brotherhood of Electrical Workers*, No. 71–1864, decided July 13, 1973, 83 LRRM 2827 (*Florida Power* Pet. App. D, pp. 105–117), the Seventh Circuit sustained the Board's decision in *Wisconsin Electric, supra*, which the Board followed in the two cases involved here. The Seventh Circuit stated that it disagreed with the view of the court of appeals majority[7] in the instant cases that the "performance of ordinary rank-and-file work * * * could not possibly be considered to fall within their [the supervisors'] ordinary managerial responsibilities," and the Seventh Circuit "align[ed] ourselves more closely" with the contrary view of Judge MacKinnon (*id.* at p. 113).[8] Similarly, in *National Labor*

[6] It is in accord with the decision of the Ninth Circuit in *National Labor Relations Board* v. *San Francisco Typographical Union No. 21*, Nos. 71–2949 and 71–2987, decided May 18, 1973, 83 LRRM 2314, petition for rehearing *en banc* pending (*Florida Power* Pet. App. E, pp. 119–122).

[7] Judge Wright, who dissented from the panel decision in *Illinois Bell* (p. 7, *supra*, n. 5), wrote the opinion for the majority when the court subsequently sat *en banc* to consider both *Illinois Bell* and *Florida Power*. Judge MacKinnon, who wrote the opinion for the panel majority in *Illinois Bell*, wrote the minority *en banc* opinion.

[8] The Seventh Circuit noted that the facts in *Illinois Bell* were different in several respects from those in *Wisconsin Electric*, and that it intimated "no view as to whether the differences call for a different result" (*Florida Power* Pet. App. D, p. 110, n. 8). The court added, however, that the facts of *Wisconsin Electric* were similar to those in *Florida Power*, and that thus, "[a]t the very least, insofar as * * * [the District of Columbia Circuit] reaches an opposite conclusion on these facts, we disagree with * * * [its] majority opinion * * *" (*ibid.*, n. 7).

Relations Board v. *Toledo Locals Nos. 15–P and 272 of the Lithographers and Photo-Engravers International Union (Toledo Blade Co.)*, 437 F. 2d 55, the Sixth Circuit sustained the Board's holding (175 NLRB 1072) that a union violated Section 8(b)(1)(B) by fining supervisor-members for continuing to work in the engraving department during a strike, in a work crew smaller than that specified in the collective bargaining agreement. "This conduct of the union," the Sixth Circuit stated, "could very well be considered as an endeavor to apply pressure on the supervisory employees of the [company] * * * and to interfere with the performance of the duties which the employer required them to perform during the strike, and to influence them to take action which it, the employer, might deem detrimental to its best interests." 437 F. 2d at 57.

As the court of appeals acknowledged both in its opinion and by its action in sitting *en banc*, these cases present "an important question of first impression arising under the National Labor Relations Act * * *" (*Florida Power* Pet. App. A, p. 4).

The question whether Section 8(b)(1)(B) protects employers from union discipline of supervisor-members who engage in the well-recognized practice of assisting their employer during an economic strike is a recurrent one in the administration of the Act. In addition to the present cases and those previously cited, *supra*, pp. 9–10, see, *e.g.*, *Operating Engineers, Local 953 (David Erven)*, 200 NLRB No. 91, 82 LRRM 1286; *Operating Engineers, Local 501 (Anheu-*

ser Busch, Inc.), 199 NLRB No. 91, 81 LRRM 1306, pending on petition to enforce, No. 73–1259 (C.A. 9); *Pattern Makers* (*Leitzau Pattern Co.*) 199 NLRB No. 14, 81 LRRM 1177; *Erie Newspaper Guild, Local 187* (*Times Publishing Co.*), 196 NLRB No. 159, 80 LRRM 1364, pending on petitions to review and enforce, Nos. 72–1251, 72–1633 (C.A. 3); *Lithographers, Local 261* (*Manhardt-Alexander, Inc.*), 195 NLRB 408; *Teamsters Local 663* (*Continental Oil Co.*), 193 NLRB 581; *Sheet Metal Workers, Local 71* (*H. J. Otten Co.*), 193 NLRB 23; *Milwaukee Printing Pressmen Union No. 7* (*North Shore Publishing Co.*), 192 NLRB 914.

In view of the conflict and the importance of the issue, review by this Court is appropriate.

2. The decisions of the Board in these cases which the court of appeals overturned were correct, and the court of appeals erroneously construed the Act. Section 8(b)(1)(B) of the Act makes it unlawful for a labor organization

> to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances * * *.

Although the provision is obviously intended to preclude the union from attempting to restrict the employer's free choice of its agent to bargain with the union or adjust grievances (*Florida Power* Pet. App. A, p. 15), the Board, with court approval, has recognized that the purposes of the provision can best be effectuated by also applying it to situations where the

union seeks, not to change the identity of the management representative, but to dictate the manner in which the selected representative performs his collective bargaining and grievance adjustment duties. *San Francisco-Oakland Mailers' Union No. 18*, 172 NLRB 2173, and cases cited at *Florida Power* Pet. App. A, pp. 19–20. The court below acknowledged that Section 8(b)(1)(B) could thus be extended beyond its literal reach (*Florida Power* Pet. App. A, p. 18) and that, indeed, it would protect a supervisor against discipline when he "crosses a picket line to perform *supervisory* work" (*id.* at 24). It concluded, however, that the Section affords no protection "when a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees," for then "he is no longer acting as a management representative" (*id.*. at 24–25). We submit that the latter conclusion is erroneous.

As the Seventh Circuit pointed out in *Local 2150 (Wisconsin Electric)*:

> [I]t can hardly be doubted that it is an essential part of the economic warfare involved in a strike for management to muster its resources in an effort to withstand the union's economic coercion. Equally undisputable, it would seem, is that an employer is not limited to combatting a strike only with his pocketbook while the business lies idle. Rather, management has "traditionally" * * * relied upon supervisors, where practicable, to pitch in and perform rank-and-file work in an attempt both to strengthen its bargaining position and to preserve the enterprise from collapse during an adverse economic repercussion following a strike. Insofar

> as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes. Indeed, in a real sense they are representing the employer for the purpose of collective bargaining, for "the use of economic pressure by the parties to a labor dispute * * * is part and parcel of the process of collective bargaining." * * * [*Florida Power* Pet. App. D, pp. 113–114.]

The Board's conclusion that Section 8(b)(1)(B) of the Act proscribes union discipline of supervisors who are union members for supporting their employer during an economic strike harmonizes that section with other provisions of the Act. Under Section 2(3), supervisors, as defined in Section 2(11), are excluded from the statutory definition of "employee," and are thus removed from the protection of the Act. This exclusion was "intended to restore to employers the right and power to insist upon the undivided loyalty of their supervisory personnel" (*Texas Co.* v. *National Labor Relations Board,* 198 F. 2d 540, 542 (C.A. 9)),[9] during a strike[10] no less than at other times.

Nor is the view of the court below that, "[w]hen Congress recognized that an employer should be able to have supervisors who owe him their undivided

[9] See the portions of the legislative history set forth at *Florida Power* Pet. App. A, pp. 39, 66–68.

[10] See H. Rep. No. 245, 80th Cong., 1st Sess. 15–16, I Legislative History of the Labor-Management Relations Act, 1947 (hereafter "Leg. Hist.") 306–307; S. Rep. No. 105, 80th Cong., 1st Sess. 5, I Leg. Hist. 411; 93 Cong. Rec. 4136, 4137, II Leg. Hist. 1065 (Senator Ellender).

loyalty, it gave the employer a specific means to achieve such loyalty—the right * * * to require employees to relinquish union membership upon promotion to a supervisory position" (*Florida Power* Pet. App. A, p. 29), supported by Section 14(a), which provides:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

The "first part of [Section 14(a)] was included presumably out of an abundance of caution," for there was "nothing in the Senate amendment which would have the effect of prohibiting supervisors from becoming members of a labor organization." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, I Leg. Hist. 564. The remaining part of the provision merely makes "clear that an employer could not be compelled to treat his supervisors like other statutory 'employees,' even if they remained in the union" (*Florida Power* Pet. App. A, p. 68). In sum, as the dissenting judges below properly concluded: "There is just nothing in the legislative history to indicate that Congress assumed that if an employee permitted his supervisors to remain in the union, he thereby impliedly accepted their dual loyalty" (*ibid.*).[11]

[11] Contrary to the reasoning of the court below (*Florida Power* Pet. App. A. pp. 30–36), *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, does not sup-

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 1973.

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port its decision. The issue there was whether union fines against *employee*-members for strikebreaking constituted an unfair labor practice under Section 8(b)(1)(A) as a restraint or coercion of those *employees* in the exercise of their Section 7 right to refrain from concerted activities. Here the question is whether the imposition of discipline against *supervisor*-members for performing struck work is an unfair labor practice under Section 8(b)(1)(B) as a restraint or coercion of the *employer* in his right to select and retain loyal representatives. "Since Sections 8(b)(1)(A) and 8(b)(1)(B) protect different interests, it simply does not follow that discipline which does not amount to restraint or coercion of the employee under the former cannot constitute restraint or coercion of the employer under the latter." *Local 2150* (*Wisconsin Electric*), *supra*, 83 LRRM at 2832 (*Florida Power* Pet. App. D, p. 115).

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